

## HEADER LINE

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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 ----- X  
4 BLUE CROSS and BLUE SHIELD : CV-98-3287  
5 OF NEW JERSEY, et al. :  
6  
7 Plaintiffs. : United States Courthouse  
8 -against- : Brooklyn, New York  
9  
10 THE AMERICAN TOBACCO COMPANY :  
11 R. J. REYNOLDS TOBACCO COMPANY :  
12 B.A.T INDUSTRIES, PLC, BROWN & : April 10, 2001  
13 WILLIAMSON TOBACCO CORPORATION : 9:30 a.m.  
14 PHILIP MORRIS INCORPORATED :  
15 and LORILLARD TOBACCO COMPANY, :  
16  
17 Defendants. :  
18 ----- X

19 TRANSCRIPT OF TRIAL  
20 BEFORE THE HONORABLE JACK B. WEINSTEIN  
21 UNITED STATES DISTRICT JUDGE, and a jury

22 APPEARANCES:  
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HEATHER K. McDEVITT, ESQ.

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21 Proceedings recorded by mechanical stenography.  
22 Transcript produced by CRI.  
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4 Tobacco Institute: One Kansas City Place  
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8 BY: WILLIAM L. ALLINDER, ESQ.  
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24 New York, New York 10017-3954  
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26 BY: JOSEPH McLAUGHLIN, ESQ.  
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28 Liggett Group, Inc.  
29 Brook Group Ltd: KASOWITZ, BENSON, TORRES  
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31 1633 Broadway  
32 New York, N.Y. 10019  
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34 BY: LEONARD A. FELIUS, ESQ.

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1 (The following occurred in the absence of the jury.)  
2 THE COURT: Is plaintiffs' counsel here?  
3 (Pause.)  
4 MR. BLEAKLEY: Are you ready for us, Judge? Or do  
5 you have something else?  
6 THE COURT: Are you going to represent the  
7 plaintiff?  
8 MR. HEFTER: I will, Your Honor. I apologize.  
9 THE COURT: The first item on the agenda, I believe,  
10 is this list of defendants' documents filed April 9 used on  
11 the cross-examination of Richard Pollay.  
12 I assume there is no objection.  
13 MR. WILLIAMS: Yes. I just checked with Mr. Pace.  
14 Your Honor. Plaintiffs have no objection to those.  
15 THE COURT: All right. The reporter is requested to  
16 list in the record at this point as admitted all documents  
17 listed as listed from A to O and then to return the package to  
18 Ms. Lowe.  
19 (The following documents are admitted into evidence  
20 as indicated by the Court.)  
21 A. DX DEM 006189 (excerpt from the 1979 Surgeon  
22 General's report)  
23 B. DX DEM 007952 (excerpt from the 1987 Economic  
24 Report of the President)  
25 C. DX DEM 006733 (excerpt from Darnon and Laroche,

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1 document that you didn't give notice of.  
 2 What about 1210?  
 3 MR. HEFTER: No, Your Honor. We did give -- we did  
 4 provide notice of these documents.  
 5 THE COURT: You did provide notice of all of these?  
 6 MR. BLEAKLEY: They were not on Doctor Farone's  
 7 reliance list.  
 8 THE COURT: He is not an expert.  
 9 MR. BLEAKLEY: We were provided the documents.  
 10 THE COURT: You were provided the documents?  
 11 MR. BLEAKLEY: Yes. Not the reliance list.  
 12 THE COURT: He is not an expert. He doesn't have to  
 13 rely on anything.  
 14 MR. BLEAKLEY: I understand that. I am not raising  
 15 that issue now.  
 16 THE COURT: What is the issue now?  
 17 MR. BLEAKLEY: The issue is there is no foundation  
 18 for this witness's testimony. It is being represented that he  
 19 is going to say he saw the document. If he is going to claim  
 20 he saw the document, we will deal with it on cross.  
 21 THE COURT: All right. Is that true of all these  
 22 documents? He saw then?  
 23 MR. BLEAKLEY: No, it is not true with all these  
 24 documents. He hasn't said even with respect to one of  
 25 these --

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1 MR. BLEAKLEY: That's your ruling. We will have to  
 2 deal with it.  
 3 THE COURT: You make an objection to each one  
 4 MR. BLEAKLEY: That's not the case with all these  
 5 documents. There are some more here.  
 6 THE COURT: Okay. I can't keep the jury. You will  
 7 have to make objections as they come in -- as they are  
 8 offered.  
 9 Don't offer then until you have established the  
 10 foundation.  
 11 MR. HEFTER: Yes, Your Honor.  
 12 THE COURT: I just can't keep the jury. I'm sorry  
 13 But you know you should come in here. I was here at 9:00  
 14 o'clock.  
 15 MR. BLEAKLEY: I was here at 9:00 o'clock, Judge.  
 16 THE COURT: I don't say this critically. I know it  
 17 is difficult. But we had between 9:00 and 10:00 o'clock to  
 18 take care of this problem. I can't keep the jury waiting  
 19 while we do this.  
 20 MR. HEFTER: I apologize.  
 21 THE COURT: The jury really makes great effort to get  
 22 here.  
 23 (Jury present.)  
 24 MR. HEFTER: Should I get the witness, Your Honor?  
 25 THE COURT: Good morning, everybody.

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1 THE COURT: Excuse me. Excuse me.  
 2 MR. HEFTER: I can't say it's true for all of them.  
 3 For a significant majority of the documents, Your Honor,  
 4 Doctor Farone was involved in discussions about the subject  
 5 matters within the documents. For at least one of them I can  
 6 see that in fact he's even mentioned in the document. That's  
 7 PTX 9722.  
 8 THE COURT: To the extent that he says that he was  
 9 involved with the subject matter or the personalities during  
 10 his employment, I will allow then to come in. He is not an  
 11 expert so we don't have a reliance list problem.  
 12 MR. BLEAKLEY: Judge, I want to make it clear, my  
 13 objection is not on the grounds that they weren't on his  
 14 reliance list. My objection is upon the grounds that these  
 15 are documents that he didn't send, nor receive, nor is he  
 16 shown as having received a copy of it.  
 17 If the witness will get on the witness stand and  
 18 claim that he saw it, I understand. Then my job is to  
 19 cross-examine him about it. But unless he is going to  
 20 represent that he saw the document, then I don't believe there  
 21 is any foundation for his testimony.  
 22 THE COURT: If he says he knew the people at the  
 23 time, they were working at the time, and that the subject of  
 24 the document was discussed with him at the time, I think they  
 25 can come in.

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1 My apologies. I apologize. It is not regrets. It's  
 2 an apology for keeping you waiting.  
 3 Will the witness come forward?  
 4 MR. HEFTER: Your Honor, Empire calls Doctor William  
 5 Farone.  
 6 THE COURT: Face me, please.  
 7 WILLIAM ANTHONY FARONE  
 8 called as a witness, having been first duly sworn,  
 9 was examined and testified as follows:  
 10 THE COURT: Give your name and spell it, please.  
 11 THE WITNESS: William Anthony Farone, F A R O N E.  
 12 MR. HEFTER: Good morning, ladies and gentlemen.  
 13 DIRECT EXAMINATION  
 14 BY MR. HEFTER:  
 15 Q Good morning, Doctor Farone.  
 16 A Good morning.  
 17 Q Can you please introduce yourself to the jury?  
 18 A My name is William Farone.  
 19 A JUROR: Can't hear, Your Honor.  
 20 THE COURT: Can't hear him.  
 21 The technology --  
 22 THE WITNESS: I think this will work.  
 23 Can you hear me okay now? I will try and talk  
 24 louder.  
 25 My name is William Farone.

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Farone-direct-Hefter

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- 1 Q Doctor Farone, we have heard from a number of medical  
2 doctors in this case so far. You are not a medical doctor.  
3 You have a Ph.D in chemistry; is that correct?  
4 A That is correct.  
5 Q Where do you currently live?  
6 A Irvine, California  
7 Q Are you married?  
8 A Yes, I am.  
9 Q How long have you been married?  
10 A Eighteen years.  
11 Q How long have you lived in California?  
12 A About sixteen years.  
13 Q Are you employed in California?  
14 A Yes, I am.  
15 Q Where do you work?  
16 A For a company called Applied Power Concepts,  
17 Incorporated.  
18 Q Where is your company based?  
19 A Anaheim, California  
20 Q This is a company that you started on your own?  
21 A Yes, it is.  
22 Q Describe for me, briefly, what Applied Power Concepts  
23 does.  
24 A We are involved in all types of biochemical, chemical  
25 technology, usually dealing with environmental issues.

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Farone-direct-Hefter

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- 1 A Yes, it is.  
2 Q You left there in 1984, correct?  
3 A That is correct.  
4 Q I will get back to the circumstances surrounding your  
5 departure from Philip Morris but right now I would like for  
6 you to describe for the jury your job titles while you were  
7 there.  
8 A While I worked at Philip Morris, I had two different  
9 jobs. For one year, I was -- held the position of Associate  
10 Principal Scientist, reporting --  
11 Q Who -- I'm sorry.  
12 A Reporting to the Vice president of Research and  
13 Development.  
14 Q Who was the Vice President of Research and Development at  
15 the time?  
16 A Doctor Robert B. Seligman.  
17 Q When you interviewed at the company, who was the  
18 Vice President of research and Development at the company?  
19 A At that time it was Doctor Melnut Wakeham.  
20 Q Was Doctor Wakeham the top scientist at Philip Morris  
21 when you joined the company?  
22 A Yes, he was.  
23 Q In what year did you join the company?  
24 A 1976.  
25 Q What did it mean to be the top scientist at Philip

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Farone-direct-Hefter

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- 1 Q Can you give me one or two examples of something that you  
2 are working on currently?  
3 A Yes.  
4 We have two series of products, for example, that you  
5 inject in the ground to clean up pollution. For example, dry  
6 cleaning solvents that may drop down into the ground from a  
7 dry cleaning establishment, they used to have to dig those up  
8 and figure out some place to put them. We developed a product  
9 that you can inject in the ground. It allows the bacteria  
10 that are already in the ground to eat those chemicals so they  
11 simply go away, and we have a product like that.  
12 We also have developed a product made from sugar and  
13 fat that's an insecticide. So you can spray it on insects.  
14 It will kill the insects but it's been approved as a food by  
15 the Food and Drug Administration. So it's not toxic to  
16 people.  
17 Q In working on these projects, do you use your expertise  
18 in chemistry?  
19 A I do.  
20 Q Now, prior to start working at your current company,  
21 where did you work?  
22 A It was a predecessor company. My company actually  
23 is -- took over one that I formed after I left Philip Morris;  
24 but prior to these companies, I worked for Philip Morris.  
25 Q That's the Philip Morris who is a defendant in this case?

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Farone-direct-Hefter

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- 1 Morris?  
2 A It means that he had the most experience in the area, was  
3 recognized by the company as someone who would have the most  
4 knowledge or the highest amount of knowledge about cigarette  
5 technology.  
6 Q Who did Doctor Wakeham report to?  
7 A In 1976, when I interviewed, he reported to Mr. Clifford  
8 Goldsmith, I believe, and then subsequent to that he was  
9 promoted to a position where he reported directly to the -- I  
10 think either the Vice President or Senior Vice President of  
11 Philip Morris, Incorporated. Philip Morris, Incorporated  
12 owned Philip Morris USA.  
13 Q Philip Morris USA is the domestic tobacco business of  
14 Philip Morris?  
15 A That is correct.  
16 Q What was Mr. Robinson's position? You said?  
17 A Seligman.  
18 Q No. The Cliff --  
19 A Clifford Goldsmith.  
20 Q Goldsmith. I'm sorry.  
21 A Mr. Goldsmith at the time that I interviewed was the  
22 President of Philip Morris USA, if I recall correctly.  
23 Q You also mentioned you had another position while you  
24 were at Philip Morris. What was that?  
25 A Yes. After a little less than one year I became Director

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## BC/BS v. American Tobacco

Condenselt™

April 2, 2001

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Page 1244

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

BLUE CROSS and BLUE SHIELD,  
of NEW JERSEY, et al.,

Plaintiffs,

v.

THE AMERICAN TOBACCO COMPANY;  
R.J. REYNOLDS TOBACCO COMPANY;  
B.A.T. INDUSTRIES, PLC; BROWN  
& WILLIAMSON TOBACCO CORPORATION;  
PHILIP MORRIS INCORPORATED;  
and LORILLARD TOBACCO COMPANY,

Defendants.

BEFORE:

THE HONORABLE JACK B. WEINSTEIN, U.S.D.J.,  
and a Jury

APPEARANCES:

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Proceedings recorded by mechanical stenography.

Transcript produced by Computer-Assisted Transcription

\* \* \*

THE CLERK civil cause on trial, Blue Cross Blue

Shield of New Jersey, et al versus Philip Morris

Incorporated, et al.

Good morning Any applications?

MR. FITZPATRICK I do not believe we have any

applications.

MR. WILLIAMS That is correct.

MR. FITZPATRICK Your Honor, you did mention perhaps

half-day issues.

THE COURT Yes. Get me the white pad on my desk.

MR. FITZPATRICK We are trying to juggle.

THE COURT Yes. My problem is this: Justice Breyer

is coming up from Washington Thursday and Friday to deliver

the Rosenberg lecture at Columbia and then to participate in

the moot court and the dean wants me there because I'll be a

part of the whole thing. I could take Thursday and Friday

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Page 1245

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BY: ALAN MANSFIELD, ESQ.  
STEPHEN SAXI, ESQ.

1 off, but I hate to do that because we lose momentum with the  
2 jury when we take a break. So, one other way of handling it  
3 might be bring them in a little early on Thursday, nine, and  
4 work until twelve. And, then, Friday start at one and go  
5 until 4:30. That will put a little pressure on me, but I  
6 would rather that than take the two days off. I will just cut  
7 out some of the formalities.

8 MR. WILLIAMS: I'm sorry. What's the schedule  
9 Friday, your Honor?

10 THE COURT: One to 4:30, maybe five. One to 4:30.  
11 What do you think?

12 MR. FITZPATRICK: Whatever is your pleasure, your  
13 Honor.

14 THE COURT: Is that workable?

15 MR. FITZPATRICK: It is workable.

16 MR. WILLIAMS: That's fine.

17 THE COURT: I rather do it than take two days off.

18 MR. FITZPATRICK: We don't mean to dislocate you too  
19 much on Friday. If you would rather not we can just --

20 THE COURT: It is such a long case. It seems to me  
21 better for the jury to come in every day, if possible. Then  
22 let's plan it that way. I'll tell the jury this morning nine  
23 to twelve on Thursday and one to 4:30 on Friday.

24 MR. WILLIAMS: Your Honor, while we are on scheduling  
25 issues, when we were selecting the jury, one of them indicated

1 AFTERNOON SESSION.  
 2 (The jury enters the courtroom.)  
 3 THE COURT: Have the witness come forward, please.  
 4 MS McDEVITT: Your Honor, we call Dr. Neal Benowitz.  
 5 NEAL BENOWITZ, called as the witness  
 6 herein, having been first duly sworn, testified as follows:  
 7 THE COURT: Give your name and spell it, please.  
 8 THE WITNESS: It is Neal Benowitz, B-e-n-o-w-i-t-z.  
 9 THE COURT: Thank you, sir.  
 10 DIRECT EXAMINATION  
 11 BY MS McDEVITT:  
 12 Q. It seems like a bit of time elapsed since Monday, so I'll  
 13 reintroduce myself. I'm Heather McDevitt and I represent  
 14 Empire.  
 15 Good afternoon, Dr. Benowitz. How are you?  
 16 A. Fine, thank you.  
 17 Q. I will start off by asking you a few questions about your  
 18 qualifications. Now, your expertise is in the field of  
 19 nicotine addiction, right?  
 20 A. Yes.  
 21 Q. Are you a medical doctor?  
 22 A. Yes.  
 23 Q. Could you tell us a little bit about yourself and your  
 24 background?  
 25 A. Well, I'm MD'ed in Rochester, New York, University of

1 Rochester. I graduated in 1969. I then did internship and  
 2 residency in internal medicine at Bronx Municipal Hospital  
 3 Center, also known as Jacobi Hospital in The Bronx. I then  
 4 went to San Francisco to do a post doctoral fellowship in  
 5 clinical pharmacology. That was at University of California,  
 6 San Francisco, where I have stayed on since that time. I  
 7 finished my fellowship in clinical pharmacology in 1973. I  
 8 then stayed on as an instructor, assistant associate, full  
 9 professor of medicine which I have been since about 1987. I  
 10 am also chief of the clinical pharmacology division of the  
 11 Department of Medicine which is a division sort of analogous  
 12 to, say, cardiology or something, but which deals with drug  
 13 related issues, teaching medical students about how to use  
 14 drugs, drug evaluation. There is a large poison center that's  
 15 part of my division as well. I'm based at the San Francisco  
 16 General Hospital which is the main county hospital in San  
 17 Francisco, where we basically take care of indigent patients,  
 18 patients without insurance in the County of San Francisco.  
 19 Q. Are you board certified in any medical field?  
 20 A. Yes, in three fields. Mainly internal medicine and then  
 21 there's also clinical pharmacology and medical toxicology.  
 22 Those are two specialty boards within the medical field.  
 23 Q. Could you tell us what clinical pharmacology is.  
 24 A. Clinical pharmacology is a specialty of medicine that  
 25 deals with studying the effects of drugs, doing research on

1 drug effects, dealing with the best way to use medications,  
 2 dealing with the assessment of drug reactions and, also,  
 3 poisonings to some extent, like drug overdoses.  
 4 Q. Could you tell us what medical toxicology is.  
 5 A. That is in some respects a portion of clinical  
 6 pharmacology that deals with the science of evaluation and  
 7 treatment of people who have suffered injuries from drugs or  
 8 chemicals. For example, a poison center practices medical  
 9 toxicology. We have a large occupational toxicology program  
 10 which deals with workplace exposures to chemicals, highway  
 11 spills, things like that. Those are all part of medical  
 12 toxicology.  
 13 Q. You've told us a bit about the different components of  
 14 your employment. I would like to take them one by one.  
 15 You have a clinical practice; is that right?  
 16 A. Yes. I spend about a third of my time in patient care.  
 17 My outpatient practice is a cardiology practice. So, it is a  
 18 half a day a week where I see patients who have heart  
 19 disease. I then spend two months of the year as attending  
 20 physician in charge of one of the medicine wards. One of them  
 21 is general internal medicine and one is cardiology. Then, for  
 22 about six weeks a year I'm the consulting physician to our  
 23 poison center, toxicology consultation service.  
 24 Q. Do you see patients with smoking related diseases?  
 25 A. Well, in my cardiology practice there are quite a few

1 patients who are smokers. Smoking is a well known cause of  
 2 heart disease and I have to deal with them on a regular basis  
 3 trying to get them to quit smoking.  
 4 Can I ask can I get a glass of water? Is that  
 5 possible?  
 6 THE COURT: Yes. I've used all my water. We'll get  
 7 some more.  
 8 THE WITNESS: Thank you.  
 9 Q. So, would you say that you work with patients who you say  
 10 deal with smoking and addiction issues?  
 11 A. Yes, on a regular basis. A significant percentage of my  
 12 patients are cigarette smokers who I deal with them trying to  
 13 encourage them to stop smoking because smoking is terrible for  
 14 heart disease.  
 15 Q. Could you describe for the jury your teaching activities.  
 16 A. I do sort of three kinds of teaching. One is what's  
 17 called bedside teaching. So, when I see patients in my  
 18 cardiology clinic there are interns, residents and medical  
 19 students there who see patients with me. When I am attending  
 20 physician on the medicine ward or cardiology ward we have a  
 21 team that's interns, residents and the medical students and,  
 22 so, we spend time going over each patient, talking about  
 23 elements of diagnosis and treatment. I also do course work  
 24 teaching. There is a course for senior medical students,  
 25 fourth year medical students that I coordinate in



PAGE 1 SHEET 1

HEADER LINE

PAGE 3

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1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK  
3 ----- X  
4 BLUE CROSS and BLUE SHIELD : CV-98-3287  
5 OF NEW JERSEY, et al. :  
6  
7 Plaintiffs, : United States Courthouse  
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10 THE AMERICAN TOBACCO COMPANY :  
11 R. J. REYNOLDS TOBACCO COMPANY :  
12 B.A.T. INDUSTRIES, PLC, BROOK & : March 27, 2001  
13 WILLIAMSON TOBACCO CORPORATION : 9:00 o'clock a.m.  
14 PHILIP MORRIS INCORPORATED :  
15 and LORILLARD TOBACCO COMPANY, :  
16 Defendants. :  
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20 UNITED STATES DISTRICT JUDGE, and a jury

## APPEARANCES:

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3 Research: 1200 Main Street  
4 Tobacco Institute: Kansas City, Missouri 64105  
5 BY: WILLIAM L. ALLINDER, ESQ.  
6 LORI CONNORS McGRODER, ESQ.

7 Philip Morris: ARNOLD & PORTER  
8 CTR: 555 Twelfth Street, N.W.  
9 TI: Washington, D.C. 20004  
10 BY: MURRAY R. GARNICK, ESQ.  
11 PETER K. BLEAKLEY, ESQ.

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13 CTR: 3050 K Street, NW, Suite 400  
14 TI: Washington D.C. 20007-5108  
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17 425 Lexington Avenue  
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21 Liggett Group, Inc. KASOVITZ, BENSON, TORRES  
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23 1633 Broadway  
24 New York, N.Y. 10019  
25 BY: LEONARD A. FEINUS, ESQ.

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1 (The following occurred in the absence of the jury.)  
2 THE COURT: What would you like to take up first?  
3 MR. BLEAKLEY: Your Honor, we submitted to the Court  
4 this morning, I don't know whether you got it.  
5 THE COURT: I haven't gotten anything from the  
6 plaintiffs in response. Let me see your draft.  
7 MR. BLEAKLEY: This is on preemption -- the  
8 preemption issue.  
9 THE COURT: Let me see the charge you wanted.  
10 Thank you.  
11 MR. BLEAKLEY: Yes, sir.  
12 (Pause.)  
13 THE COURT: Well, where is Exhibit 1? I just have  
14 Exhibits 2 and 3.  
15 MR. BLEAKLEY: Did I forget to give you one? Sorry.  
16 THE COURT: Has the plaintiff seen these?  
17 MR. BSCHORR: We got them about twenty minutes ago.  
18 Your Honor.  
19 THE COURT: Develop your answer to them. Then we  
20 will proceed.  
21 All right. I have a small calendar.  
22 (Recess taken.)  
23 (Continued on next page.)  
24  
25

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1 well aware of it.  
 2 Next, please.  
 3 Oh, I'm sorry.  
 4 What do the subscribers know? One hundred and  
 5 fifty-six were deposed. One hundred and forty-eight out of  
 6 the one hundred and fifty-six knew it was difficult to quit.  
 7 One hundred and forty-eight of the one hundred and  
 8 fifty-six knew someone else who found it was difficult to  
 9 quit.  
 10 Next, please.  
 11 All the one hundred and fifty-six subscribers  
 12 testified that they had never heard a statement by the tobacco  
 13 industry that smoking was easy to quit. The reason for that  
 14 is the tobacco industry never said that. They never said it  
 15 was easy to quit. No matter what words they used to describe  
 16 addiction, habit of addiction, dependence, nobody ever said it  
 17 was easy to quit and nobody thought that it was easy to quit.  
 18 If you've ever known a smoker, you know it's not easy  
 19 to quit. It's a common knowledge.  
 20 What did the Empire employees and what did the Empire  
 21 officials say about their knowledge? Well, we took the  
 22 deposition of dozens of their employees and I am only going to  
 23 play two and I am going to play then very quickly. The first  
 24 one I am going to play is Carmine Annirati.  
 25 MR. BSCHORR: Your Honor, again, I rise.

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Opening - Dunne

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1 seen the evidence.  
 2 The first evidence is at the depositions of the  
 3 subscribers, they would be cross-examined by Empire and they  
 4 would be shown documents and told these documents are secret  
 5 internal documents and asked a hypothetical, to speculate.  
 6 (Continued on next page.)  
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Opening - Dunne

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1 THE COURT: Yes. I think you can play that during  
 2 your presentation.  
 3 MR. DUNNE: Thank you, Your Honor.  
 4 THE COURT: Sustained.  
 5 MR. DUNNE: He became Director of Professional  
 6 Activities in 1952. He rose to become Vice president and  
 7 Corporate Secretary. Here is what he said.  
 8 MR. BSCHORR: I thought Your Honor just sustained it.  
 9 THE COURT: Yes.  
 10 MR. DUNNE: I beg your pardon. You had ruled earlier  
 11 I could play these two, Your Honor.  
 12 THE COURT: All right. If you think --  
 13 MR. DUNNE: It will be very quick.  
 14 MR. BSCHORR: It is again going to Empire awareness  
 15 which is not in this case.  
 16 THE COURT: Go ahead. Play then.  
 17 MR. BSCHORR: It's all cumulative.  
 18 (Tape plays; tape stops.)  
 19 MR. DUNNE: And the last tape I will play is the  
 20 president of Empire. His name is Michael Stocker. He is a  
 21 medical doctor. I will let his testimony spoke for itself.  
 22 (Tape plays; tape stops.)  
 23 MR. DUNNE: Now, faced with this evidence, that its  
 24 subscribers were well aware of the risks of smoking, Empire  
 25 will put on evidence of two things. We know because we have

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Dunne-opening

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1 MR. DUNNE: (Continuing) I--  
 2 THE COURT: Excuse me, I don't want this at this  
 3 stage.  
 4 MR. DUNNE: Very well. I think they're going to put  
 5 on -- all right. I'll try one other thing. I'm not going to  
 6 argue it, your Honor.  
 7 In fact, what I'm going to do, I think what everybody  
 8 wants me to do is I'll stop. I just want to say in quick  
 9 closing that one of the things Empire has to do, they have to  
 10 prove to you, they have the burden of proving to you that  
 11 their subscribers were defrauded, misled, did not know, relied  
 12 on something we said and the overwhelming evidence that we  
 13 have obtained from the subscribers is that they didn't rely on  
 14 the tobacco industry whatsoever in making their health and  
 15 tobacco choices. At the end of the case, we're going to ask  
 16 you to give us a defense verdict. Thank you very much.  
 17 THE COURT: Thank you.  
 18 Call your first witness.  
 19 MR. BSCHORR: Your Honor, could I approach the  
 20 bench?  
 21 THE COURT: No. We just have time for a brief  
 22 introduction.  
 23 MR. BSCHORR: We have a couple of applications.  
 24 MR. FITZPATRICK: Good afternoon. I'm  
 25 Mr. Fitzpatrick representing Empire. I'm finally going to put

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Dunne-opening

1 on a witness for you. I would ask our first witness,

2 Dr. David Burns to take the stand.

3 THE COURT: Face me and be sworn.

4 D A V I D M. B U R N S,

5 having been duly sworn, was examined and

6 testified as follows:

7 THE COURT: Give your name, spell it, please.

8 THE WITNESS: David Michael Burns, B U R N S.

9 DIRECT EXAMINATION

10 BY MR. FITZPATRICK:

11 Q Good afternoon, Dr. Burns.

12 A Good afternoon.

13 Q I would like to cover in the brief time we've got today  
14 your qualifications.

15 Are you a medical doctor, sir?

16 A Yes, I am.

17 Q What kind of medical doctor are you?

18 A I'm a pulmonary physician, physician who specializes in  
19 lung disease.

20 Q Could you give us a little bit of your background?

21 A Certainly. I grew up in Boston, went to college,  
22 undergraduate, two years to Dartmouth Medical School, received  
23 my doctorate in medicine from Harvard Medical School.

24 Following that, I trained in internal medicine at Boston City  
25 Hospital for two years. I then spent two years in the Public

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Burns-direct-Fitzpatrick

1 years with the National Clearing House for Smoking and  
2 Health. That was the organization within the U.S. Public  
3 Health Service that was responsible for producing the Surgeon  
4 General reports, also for collecting the entire world's  
5 literature, everything that was published on smoking and  
6 health and reviewing it as well as conducting programs to try  
7 and change smoking behavior.

8 During that two year period of time I wrote the 1975  
9 Surgeon General's report and was involved in many of the  
10 activities of the Bureau of Health, Education and the National  
11 Clearing House for Smoking and Health in efforts to change  
12 smoking behavior.

13 Subsequent to that, I went to train in lung disease  
14 as I've described and in 1978 when Joseph Califano became  
15 Secretary of Health and Human Services, he decided on  
16 consultation with the physicians in the Public Health Service  
17 that smoking was a very serious and very high priority issue.  
18 We then commissioned a complete review of everything that was  
19 known up until that time on smoking and health. That became  
20 the 1979 Surgeon General's report, about 2025 pages long. I  
21 had the privilege of being both an author and editor for that  
22 volume.

23 Because of that experience and because of my  
24 interest, I maintained a relationship with the Office on  
25 Smoking and Health. I was an associate scientific editor for

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Burns-direct-Fitzpatrick

1 Health Service at the Centers for Disease Control, the  
2 National Clearing House for Smoking and Health; I subsequently  
3 spent three years in a fellowship in lung disease at the  
4 University of California San Diego training in both chest  
5 medicine, lung disease and critical care.

6 Q You're a professor at the University of San Diego Medical  
7 School?

8 A Yes, been on the faculty at the San Diego Medical School  
9 since 1979. I'm now a full professor there.

10 Q You mentioned Centers for Disease Control. What are the  
11 Centers for Disease Control?

12 A The Centers for Disease Control are one agency of the  
13 U.S. Public Health Service. It is the agency that is  
14 responsible for disease prevention and control. Originally,  
15 they started out controlling malaria, yellow fever, other  
16 infectious diseases. Then in the last 30 -- well, the last  
17 50 years -- they've begun to become involved in controlling  
18 chronic diseases as well, both initially tuberculosis and  
19 subsequently diseases such as cancer, heart disease, lung  
20 disease.

21 Q Dr. Burns, you have spent a fair amount of time studying  
22 the issues of tobacco and health, have you not?

23 A I have.

24 Q Would you describe your career in that area, please?

25 A When I went into the Public Health Service, I spent two

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Burns-direct-Fitzpatrick

1 each of the next three Surgeon General's reports, the one in  
2 1980 which was Health Consequences for Women. That has been  
3 updated today, as a matter of fact with a new report that's  
4 been released today.

5 In 1981 it was a report on the change in cigarette,  
6 new low tar nicotine cigarettes. In 1982 we produced a report  
7 on cancer.

8 My involvement increased from that point on in that I  
9 became the senior scientific editor for those volumes,  
10 accepted more responsibility for the finding of scientific  
11 content, for helping to select individuals who would  
12 participate in drafting those volumes and I was the senior  
13 scientific editor for the volume on chronic lung disease --  
14 sorry, I left one out.

15 Q Perhaps we could interrupt you. We have a demonstrative  
16 that may help your recollection.

17 A All right.

18 Q Does this list the various Surgeon General reports that  
19 you've been involved with?

20 A Yes, this is a list of the Surgeon General's reports from  
21 1975 through 2000. The only one missing is the one that was  
22 released today. I have been the author, editor or senior  
23 reviewer for each of these reports since 1975.

24 We've gotten to 1982. In 1983 I was also an  
25 associate scientific editor for the volume on heart disease.

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